IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.555 1989

Vishwas Pandurang Dhivar,
aged about 23 years,
Occupation Student,
residing at Nargude,
Taluka Purandhar,
District Pune.
(Now in Yerwada Jail, Pune) ...Appellant.

V/s

The State of Maharashtra ...Respondent.

Mr. V.S. Kapse with Mr. S,L. Kapse for the appellant.

Mr. A.M. Shringarpure, APP for the State.

CORAM: V.M.KANADE,J.

DATE: 20th October, 2004.

ORAL JUDGMENT:

1. Appellant is challenging the Judgment and Order passed by the Additional Sessions Judge, Pune in Sessions Case No.610 of 1988. By the said Judgment and Order, the Additional Sessions Judge was pleased to convict the accused for having committed an offence punishable under section 376 of the Indian Penal Code and sentenced him to suffer R.I. for 7 years and to pay fine of Rs 500/- and, in default, to suffer R.I. for six months.

2. Prosecution case in brief is that the prosecutrix was a girl aged about 16 to 17 years. She was

residing in Hargude along with her parents, brothers, and sister-in-law. On 9/8/1988, Sanjana was alone in the house when the accused - Prakash came to her house along with basket containing lady's fingers. He asked her whether she wanted to buy lady's fingers. Prosecutrix, however, told him that she was not interested in buying vegetables. The accused then came inside the house and embraced the prosecutrix who some-how escaped from the clutches of the accused and tried to run away. However, the accused caught her from behind and made her lie down on the ground and committed sexual intercourse with her without her consent. While leaving the house, he threatened her that she should not disclose the incident to any one, otherwise he would kill her. After her father returned home, Sanjana narrated the incident to him. A complaint was filed on the next day. Accused was arrested. Charge-sheet was filed against him. The Trial Court convicted him on the basis of the evidence adduced by the prosecution.

3. The learned Counsel appearing on behalf of the appellant submitted that apart from the testimony of the prosecutrix, there was no other evidence to corroborate her testimony. It is submitted that from the evidence of Dr Ms.Sucheta Deolay, it can be seen

that there was no other injury on her body except a small scratch on her chin. It is submitted that the accused was sent for medical examination. However, medical certificate was not produced on record. It is submitted that it was a serious lacuna on the part of the prosecution. He submitted that there was no evidence adduced by the prosecution to prove that the appellant had the capacity to indulge in the sexual intercourse. He further submitted that from the Chemical Analyser's report it could be seen that no semen was found either on the clothes of the prosecutrix or on the clothes of the accused. It is further submitted that the absence of injuries on the person of the prosecutrix was a strong circumstance which indicated that there was no resistance and that the possibility of consent could not be ruled out. It is further submitted that the age of the prosecutrix which was given in the FIR was 17 years and, therefore, she had reached the age of understanding. It is submitted that the circumstances brought on record indicated that the sexual intercourse had taken place with the consent of the prosecutrix.

4. The learned APP appearing on behalf of the State submitted that the sole testimony of the prosecutrix was sufficient to convict the accused. It is

submitted that P.W.5 - Dr Ms. Sucheta who had examined her has stated that the hymen of the prosecutrix was torn and the tear was fresh. She further stated that the vagina did not admit the passage of two fingers. It admitted one finger with little pain. It is submitted that the prosecutrix was not habituated to sexual intercourse. The learned APP submitted that the medical evidence supported the case of the prosecution. He submitted that there was no reason to interfere with the order of the Trial Court.

5. In the present case, prosecution has examined six witnesses. P.W. 2 - Sanjana who is the prosecutrix has stated that her menstruation cycle had started about 3 years before the incident and, on the date of the incident, i.e. on 8/8/1988 she was in menses and she returned home from the school at about 5.00 p.m. She has stated that her house was locked and she took the key from the window where it was kept and opened the lock and entered the house. She changed her clothes and switched on the light. At that time, accused came to her house and asked her whether she wanted to buy lady's fingers. She told him that there was no one in the house and she did not want to buy the lady's fingers. The accused, thereafter, entered the house and chained the door of the front room of

the house from inside and then he embressed her. He, thereafter, pressed her neck by his left hand and pressed her breast by his right hand. According to her, thereafter, she escaped from his clutches and started running but he embressed her from behind and took bite on her right cheek and put his finger in her mouth. Thereafter, he made her lie on the ground, put both his legs on her legs, lifted her peti-coat, lowered down her underwear and committed rape on her. Thereafter, he opened the door and went to his house through a passage and before that he threatened her that she should not inform any one about the incident. After her father returned to the house, she narrated the incident to her father. A complaint was lodged on the next day.

6. P.W.5 - Dr. Ms. Sucheta is a Medical Officer who had examined the prosecutrix. She has stated that she did not notice any external injury on her person except the scratch over her skin. She has further stated that she did not notice any injury on her external genitals. She, however, found that her hymen was torn and tear was fresh. In her cross-examination, P.W.5 has stated that if there is a forcible intercourse, external injuries are noticed on the other parts of the body. From the evidence of the

prosecutrix, it can be seen that she has stated that she had resisted the attempt of the accused to commit sexual intercourse. She has stated that, initially, after he had embressed her, she escaped his clutches. The medical evidence, however, does not show that there were any injuries on the person of the prosecutrix. There were no injuries on the external genitals of the prosecutrix. The prosecutrix has stated that she was 17 years of age. She has stated that she shouted after the accused had embressed her and even when the accused made her lie down on the ground, she was resisting him by giving kicks with hands and legs and, at the time, when the accused had forcible intercourse with her, she was giving blows with her hands. However, in spite of this, no injuries were found on the person of the prosecutrix as also on the person of the accused. It is an admitted position that though the accused was examined after he was arrested, the medical certificate has not been brought on record. Prosecution has not examined the neighbour of the prosecutrix Hemlata or any other person. It is difficult to accept the case of the prosecution in the absence of any injuries on the person of the prosecutrix and on her private parts that the accused had forcibly tried to commit rape on her. The prosecutrix has not stated as to how the

accused entered the house. She has not stated that when the accused came to her house, she had opened the door and had allowed the accused to come inside. There is some amount of vagueness in the statement of the prosecutrix regarding the entry of the accused in the house. According to the prosecutrix, the accused had brought a basket containing lady's fingers and he had kept the basket near the door of the kitchen. There is no reference to lady's finger as the same are not found in the panchanama nor the prosecutrix has stated that the accused had taken the bag containing lady's finger alongwith him. Thus, it is difficult to accept the prosecution case that the accused had committed forcible sexual intercourse on the prosecutrix and the benefit of doubt will have to be given to the accused. The Chemical Analyser's report also does not support the prosecution case as semen was not found either on the clothes of the accused or on the clothes of the prosecutrix. The Trial Court has disbelieved the theory of consent on the ground that the prosecutrix was in menses and, therefore, was unlikely to invite the accused to have sexual intercourse with her. Further, the Trial Court has held that the prosecutrix had offered resistance and the injury on her chin supported her version. In my view, both these findings are based on hypothesis.

Considering the circumstances as a whole, it is difficult to accept the prosecution case that the prosecutrix had offered resistance. A sole injury on the chin would not be sufficient to come to the conclusion that she had offered resistance. The Trial Court also erred in not giving importance to the non-examination of Hemlata who was the neighbour and who approached the prosecutrix immediately after the incident. Thus, the Judgment and Order of the Trial Court will have to be quashed and set aside.

Accordingly, the following order is passed.

O R D E R

. Appeal is allowed. Appellant/Accused is acquitted of the offence with which he is charged. Judgment and order of the trial court is set aside.

V.M. KANADE, J.